FILED
JUL 24 1953
HAROLD B. WILLEY, Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM—1953

No. 202

WILLIAM WEIDLICH,

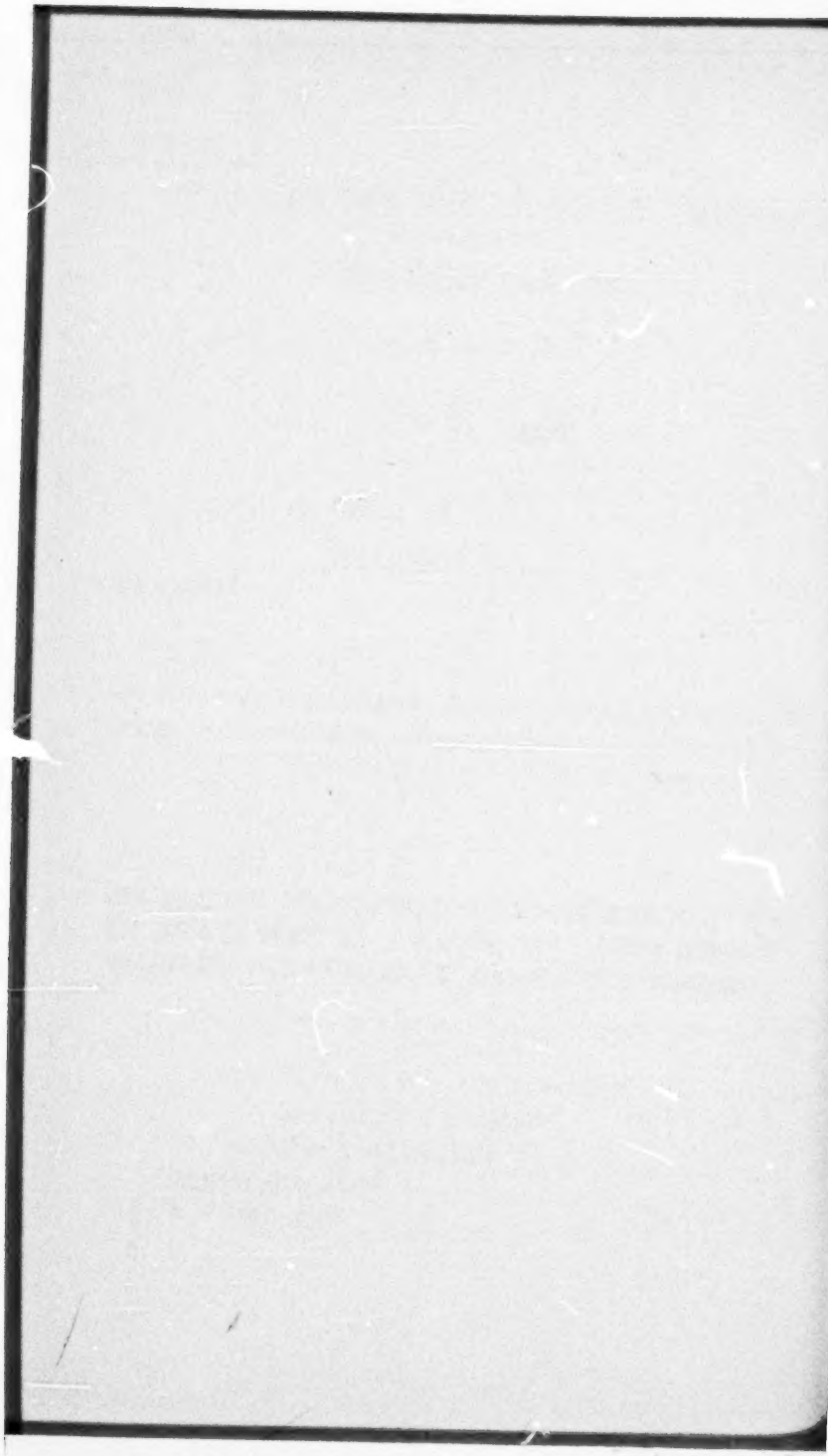
Petitioner,

vs.

ESTATE OF LOUIS WEIDLICH (THE FIRST NATIONAL BANK & TRUST COMPANY OF BRIDGEPORT AND ARTHUR M. COMLEY, EXECUTORS) AND HETTY S. WEIDLICH

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT AND BRIEF IN SUPPORT THEREOF

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INDEX

Subject Index

	Page
Petition for Writ of Certiorari	1
Preliminary Statement	1
How the Questions Were Raised in the State Courts	2
Statement of Facts	3
Jurisdiction to Review	5
Statutes Involved	5
Questions Presented	6
Reasons Relied On for the Allowance of the Writ	7
Brief in Support of Petition	9
Opinions Below	9
Argument	9
Point I—Despite the hearings accorded to petitioner, he has been denied due process and equal protection of the law	9
Point II—Paragraph three of the testator's will, as interpreted, ousts the Probate Court of its jurisdiction over widows' allowances and deprives petitioner of his rights under the due process and equal protection of law provisions of the XIVth Amendment to the Constitution	15
Conclusion	20

Table of Cases

Brinkerhoff-Faris Trust & Savings Co. v. *Hill*, 281 U.S. 673 14

Colonial City Traction Co. v. *Kingston City R. Co.*, 154 N.Y. 493 12

Coe v. *Armour Fertilizer Works*, 237 U.S. 413 13

Doyle v. *Continental Ins. Co.*, 94 U.S. 535 16

Hammerstein v. *Superior Court of California*, 340 U.S. 622, 919, 341 U.S. 491 ..... 9, 10, 11

Page

Havens' Appeal, 69 Conn. 684 ..... 5, 11
Hoenig v. *Lubetkin*, 137 Conn. 516 15
Home Insurance Co. v. *Morse*, 87 U.S. 445 ..... 16, 18
In re Andrus' Will, 281 N.Y.S. 831 18
Leavenworth v. *Marshall*, 19 Conn. 408 ..... 5, 9
Mack's Appeal, 71 Conn. 122 6
Milk Wagon Drivers Union v. *Meadowmoor Dairies*, 312 U.S. 287 ..... 19, 20
Mullane v. *Central Hanover Bk & Trust Co.*, 339 U.S. 306 14
Parker, Peebles & Knox v. *El Saieh*, 107 Conn. 545 16
Pennoyer v. *Neff*, 95 U.S. 733 10
Potwine's Appeal, 31 Conn. 381 6
Reiley v. *Healey*, 122 Conn. 64 14
Walkinshaw v. *O'Brien*, 130 Conn. 122 6
William Weidlich v. *Estate of Louis Weidlich (The First National Bank & Trust Co. of Bridgeport and Arthur M. Comley, Executors) and Hetty S. Weidlich*, 96 Atl. 2d 547 ..... 2, 3, 7, 8, 11, 12, 13, 15 ..... 17, 19

OTHER CITATIONS

Williston on Contracts, § 1725, n. 2 16

SUPREME COURT OF THE UNITED STATES

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ESTATE OF LOUIS WEIDLICH (THE FIRST NATIONAL BANK & TRUST COMPANY OF BRIDGEPORT AND ARTHUR M. COMLEY, EXECUTORS) AND HETTY S. WEIDLICH

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT

To the Honorable, the Chief Justice of the United States and Associate Justices of the Supreme Court of the United States:

Your petitioner, William Weidlich, prays that a writ of certiorari issue to review a judgment of the Supreme Court of Errors of the State of Connecticut in the within action, dated April 21, 1953 (R. 31).*

Preliminary Statement

Petitioner is a remainderman named in the will of his late brother Louis. Respondents herein are executors under such will and Hetty S. Weidlich, decedent's widow.

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* References in parentheses are to pages of the Record on Appeal.

The Probate Court, District of Fairfield, State of Connecticut, awarded a further allowance to the respondent widow for support. From the decree awarding the further widow's allowance petitioner appealed to the Superior Court for Fairfield County, which dismissed the appeal after trial *de novo*. Petitioner then appealed to the Supreme Court of Errors which affirmed the judgment appealed from.

Petitioner contended in the lower courts that (1) in the absence of any showing of necessity for or of the widow's dependency the further allowance was in excess of the powers conferred upon the Probate Court by § 7033, General Statutes of Connecticut, Revision of 1949, and (2) paragraph third of the testator's will, as construed, ousted the Connecticut courts of exclusive jurisdiction over the widow's allowance and deprived petitioner of property contrary to the due process clause of the XIVth Amendment to the United States Constitution.

The Supreme Court of Errors did not pass upon the first question but ruled adversely to petitioner upon the second and accordingly affirmed the decision of the Superior Court dismissing the appeal thereto. Petitioner assigns those two rulings by the Supreme Court of Errors as error and respectfully requests a review of their correctness.

How the Questions were Raised in the State Courts

The Supreme Court of Errors explicitly and directly held that its construction of paragraph third of the testator's will did not oust the Probate Court of exclusive jurisdiction over the widow's allowance and did not deprive petitioner of his property rights contrary to the due process and equal protection of the law clauses, § 1 of the 14th Amendment to the United States Constitution (R. 27, 29). The federal question was assigned as error and was briefed

by all parties, but the Supreme Court of Errors begged the question in describing petitioner's [plaintiff's] argument as "tenuous, unconvincing and without support in authority" (R. 24, 25, 29).

Similarly at trial term the Superior Court overruled petitioner's [plaintiff's] claim of law that paragraph third of the will construed as valid deprives petitioner of property rights contrary to the due process and equal protection of law clauses of Amendment XIV to the United States Constitution [Finding 28] (R. 24, 25).

Statement of Facts

The testator, Louis Weidlich, died on July 21, 1950, without descendants (R. 20). His spouse, Hetty S. Weidlich, survived him and was the sole beneficiary of the residuary trust set up in his will (R. 7, 87). The executors, named by the testator, qualified as such (R. 20).

On August 15, 1950 the Court of Probate, District of Fairfield, without notice or hearing, by *ex parte* order awarded respondent-widow an allowance for her support of $1,250 a month, payable until further order (R. 20, 21 and counsel's concession, Brief, p. 3). Pursuant thereto the respondent-executors paid out of principal $15,000 to the widow (R. 21).

Respondent-widow's private resources, mostly in cash, aggregated $291,785.67 in 1950 and 1951 (R. 21, 23). They consisted of a cash legacy of $50,000, homestead and land appraised at $57,500, jointly owned property [with Louis Weidlich] valued at $18,479.03, income from the residuary trust established by testator's will of $21,714.26, life insurance proceeds of $41,587.38, cash distributions of Weidlich Bros. Mfg. Co., in liquidation, of $82,500, widow's allowance of $15,000 for the year ending July 25, 1951 and personal

property inventoried in the Estate of Louis Weidlich at $5,005 (R. 21, 23).

Paragraph third of decedent's will reads (R. 5, 6):

> "I direct my executors on behalf of my wife, Hetty S. Weidlich, to apply to the Probate Court for an allowance for her support and maintenance while my estate is in the process of settlement, and if, for any reason, the Court shall not make such allowance, I direct my Executors to pay to my wife for her support and maintenance the sum of One Thousand Two Hundred and Fifty Dollars ($1,250.00) per month, while my estate is in the process of settlement, however long that period may be, and to charge said sums against the principal of my estate."

On August 14, 1951 the petition of the respondent-executors for a further widow's allowance was granted by the Probate Court for the widow's "support" in the same amount, viz., $1,250 a month (Exhibit A, R. 38).

On petitioner's appeal to the Superior Court from the order granting the further allowance, dated August 14, 1951, respondents [appellees] advanced as a reason for the grant of the order the fact that payments in the same amount had been paid to the widow for one year under the prior *ex parte* order dated August 15, 1950 (R. 22).

In the lower courts the respondents failed to allege the dependency of the widow upon her husband or his estate or circumstances showing the necessity for a widow's allowance (Ex. A, R. 37 and Answers, R. 14-16). Nor did they offer any evidence of the means or living scale of decedent, of his wife or of her dependency upon the estate (R. 22). Instead they contended that the allowance was payable under paragraph third of the will even without resorting to the Probate Court therefor (R. 22, Finding 13 (4)).

The conclusion of the Superior Court that "even though no order had been entered by the Probate Court for an

allowance" * * "the widow was entitled to receive $1,250 a month out of the principal of the estate", by virtue of the third paragraph of the will, was affirmed by the Supreme Court of Errors. Thus, the State courts held in effect that petitioner was not aggrieved by the complete disregard of the requirements of § 7033 General Statutes of Connecticut (1949) or by depriving him of his property, without a judicial hearing held under the cited statute, which vests the exclusive jurisdiction over a widow's allowance in the Court of Probate (*Havens' Appeal*, 69 Conn. 684, 699).

Jurisdiction to Review

Jurisdiction of this court is invoked under Title 28, United States Code, § 1257 (3). Judgment of the Supreme Court of Errors of Connecticut was entered on April 21, 1953 (R. 31). On April 24, 1953 petitioner filed a motion for reargument of the appeal, which was denied by said Supreme Court of Errors on April 29, 1953 (R. 36).

Statutes Involved

The provisions of the United States Constitution, § 1, of the 14th Amendment relating to due process and equal protection of law, are directly involved in this cause. § 7033, General Statutes of Connecticut, Revision of 1949, reads:

> "The court of probate may allow out of any estate of a deceased person in settlement before such court such amount as it may judge necessary for the support of the surviving spouse or family of the deceased during the settlement of the estate."

Since 1825 the Court of Probate in Connecticut has had exclusive jurisdiction over a widow's allowance.

Leavenworth v. *Marshall*, 19 Conn. 408, 418
Havens' Appeal, 69 Conn. 684, 699

The Connecticut Constitution declared the Superior Court a court of general jurisdiction (Conn. Const., Article V, § 1). All other Connecticut courts of first instance, including the Probate Court, are of limited jurisdiction (*Walkinshaw* v. *O'Brien*, 130 Conn. 122, 133). The Probate Courts may look only to the statutes for their powers (*Potwine's Appeal*, 31 Conn. 381).

§ 7071, General Statutes of Conn. (1949), provides for an "appeal" to the Superior Court by "any person aggrieved" from "any order, denial or decree of a Court of Probate in any matter". Such appeal, however, is peculiar in that it is not heard upon the record in the Probate Court, but presents anew both issues of law and fact for determination by the Superior Court after retrial therein. (*Mack's Appeal*, 71 Conn. 122).

Questions Presented

First, whether petitioner (plaintiff) was accorded due process under the Constitution by the grant and payment of the widow's allowance on the ground that an allowance in the same amount had previously been made and paid without any notice to or opportunity for a hearing by petitioner?

Petitioner appealed to the Supreme Court of Errors and assigned as additional error that the order granting a further allowance was contrary to § 7033, General Statutes of Connecticut, Revision of 1949, in that no payment was necessary for the widow's support in view of her private resources.

The Supreme Court of Errors, without expressly ruling upon the merits, held that *if* petitioner (plaintiff) were to prevail upon his appeal no allowance could be paid under the Probate Court order and the executors would then be obliged to pay the widow the same amount of money out

of principal pursuant to paragraph third of the will. On this hypothesis the court concluded that petitioner was not an aggrieved party entitling him to appeal since the funds withdrawn from principal, belonging to remaindermen, would be the same whether paid over under court order or pursuant to the will.

Said Supreme Court of Errors also ruled that paragraph third of the will, as construed, did not oust the Probate Court of its established statutory jurisdiction over widows' allowances and that consequently petitioner's (plaintiff's) rights under the XIVth Amendment were not violated.

Petitioner seeks review of these holdings as depriving him of property and rights contrary to the due process and equal protection of law clauses of the United States Constitution, XIVth Amendment, § 1.

Reasons Relied on for The Allowance of The Writ

In holding that the payments made out of principal to the widow constituted a gift under paragraph third of the will and that the judgment appealed from did not deprive petitioner (plaintiff) of property and rights contrary to the XIVth Amendment, the Connecticut Supreme Court of Errors decided a substantial federal question relative to a remainderman's right to a judicial determination under the law (§ 7033, Gen. Stats.) governing a widow's allowance and its requirements that an allowance could be granted only to a widow in need thereof.

In holding as a procedural matter that petitioner (plaintiff) was not an aggrieved party because the pecuniary result would have been the same to him even if no court order for an allowance had been made, the Supreme Court of Errors decided the case on an assumption unwarranted by the record and contrary to the due process and equal

protection of law clauses of the XIVth Amendment to the Constitution.

The record on appeal establishes beyond question that the executors were without authority to make payments to the widow as an allowance except in the event of denial of their application therefor, which never occurred, and the Supreme Court of Errors, while holding that the third paragraph of the will was *"free from any possible ambiguity"* then proceeded to construe it as a *"conditional bequest"* in favor of the widow. Such construction is no answer to petitioner's protest in the lower courts that his property had been taken from him without due process and the equal protection of the laws had been denied to him.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court, directed to the Supreme Court of Errors of the State of Connecticut, commanding said Court to certify and send up to this Court, on a date to be designated, a full and complete transcript of the record and of all proceedings in this cause, to the end that this cause may be reviewed and determined by this Court; that the judgment of said Supreme Court of Errors be reversed and that petitioner be granted such other and further relief as may be just.

WILLIAM WEIDLICH,
Petitioner.

By CLIFTON F. WEIDLICH,
Counsel for Petitioner,
55 Liberty Street,
New York 5, N. Y.

June 27, 1953.

BRIEF IN SUPPORT OF PETITION

Opinions Below

The opinion of the Supreme Court of Errors is reported in 96 Atl. 2d 547 (R. 25-30); motion for reargument denied (R. 36). The opinion of the Superior Court was not reported (R. 16-18).

Argument

POINT I

Despite the Hearings Accorded to Petitioner, He Has Been Denied Due Process and Equal Protection of the Law

The law of Connecticut as to a widow's allowance is stated in *Leavenworth* v. *Marshall,* 19 Conn. 408, 418:

> "But the power of taking the property of an heir or devisee, and appropriating it for the benefit of others, without the consent of the owner, ought to be cautiously exercised, and never carried beyond the necessary requirements of the case.
>
> "The true rule upon this subject is this. Wherever the widow and family of a deceased person have adequate provision made for their support, either by will, or in any other manner, they are not entitled to a support out of the shares of others, who are not members of the family."

Here the private resources of the widow, within 18 months of her husband's death, were almost $292,000, mainly in cash (R. 21, 23). Neither the widow nor the executors proffered any evidence of the former's need for support (R. 22). Instead the executors petitioned the Probate Court on the sole ground that a prior *ex parte* order had been made for an allowance of $1,250 a month for the widow's support, which had been paid to the extent of $15,000 (R. 37).

The case is analogous to that of *Hammerstein* v. *Superior Court of California,* wherein certiorari was originally

granted by this Court (340 U. S. 919). There petitioner was the putative father of a child, born after a Nevada divorce, who brought action in California, her birthplace, to declare that she was petitioner's lawful child. Hammerstein, a New York resident, appeared specially in the California court and moved to quash service of process made upon him in New York.

The grounds of the motion were that the paternity action was *in personam* and that a judgment adverse to petitioner in California would establish his personal liability to support the child, who intended to bring action on such judgment in New York. Petitioner there argued that such procedure would violate the due process clause of the XIVth Amendment under the doctrine of *Pennoyer* v. *Neff*, (95 U. S. 733).

The analogy to the instant case is evident. Here the pleaded basis of the order for a further allowance was the *ex parte* award made on August 15, 1950 (Ex. A, R. 37). In other words, the executors, having secured an allowance without notice or hearing in 1950, returned to the Probate Court a year later and asked for a further award on the sole ground of the entry of the *ex parte* order and of payment to the widow of $15,000 thereunder for twelve months.

From the due process aspect we perceive no substantial distinction between a money judgment based on a foreign judgment, entered without personal jurisdiction over defendant, and an award for a widow's allowance, payable out of capital assets, based upon a prior order awarding the same amount to the widow but entered without notice to the interested remaindermen or opportunity for them to be heard. Moreover, Hammerstein was officially notified of the California action but cautiously refrained from contesting it, whereas here there was no notice whatsoever given to petitioner in 1950 when the original order for allowance was made.

The Superior Court held that pursuant to paragraph third of the will the widow was entitled to $1,250 a month out of principal of the estate, "even though no order had been entered by the [Probate] Court for an allowance" (Finding 21, R. 23). It also found that no evidence of the widow's dependency upon her husband or his estate had been offered and that her private resources derived from the estate and elsewhere amounted to almost $292,000 (R. 22, 21, 23).

Thus, there was no pretense of compliance with the requirements of § 7033, General Statutes (1949) and its long established construction that "where there is no dependency there can be no duty of support" and hence no allowance for a widow who is amply provided for by the will and otherwise (*Havens' Appeal*, 69 Conn. 684, 699).

Up to this point, while petitioner participated in hearings in two courts, there had been no ruling on the merits of the application for allowance in accordance with the statutory law applicable (§ 7033, Gen. Stats.) or the principles of the case law construing the controlling statute. In reality the hearings were sham insofar as they afforded protection to or enforcement of petitioner's property rights as a remainderman.

Nor were the merits of the application for allowance mentioned in the opinion of the Supreme Court of Errors (R. 25-30). But the merits of petitioner's claims under the constitution were decided against him (R. 29). In *Hammerstein* v. *Superior Court*, (340 U. S. 622) the case was remanded by this Court because in the absence of state court opinions it was not clear whether any federal question had been decided. Subsequently certiorari was denied by a divided vote (341 U. S. 491).

The Supreme Court of Errors held flatly that there was no violation of the due process or equal protection of the law clauses in affirming the judgment of the Superior Court

(R. 29). Its reasoning, though, is novel for a court of last resort, since it rests upon an assumption of fact outside the Record.

Its *ratio decidendi* was: If we were to reverse the judgment appealed from, no further allowance could be made by the Probate Court. Thereupon, the direction in paragraph third of the will would take effect, requiring the payment by the executors of $1,250 a month to the widow. The result would not make a single dollar's difference to petitioner's (plaintiff's) remainder interest, for it would be the same whether the payments to the widow were made under court order or pursuant to the will. Therefore, the court concluded, petitioner could not be an *aggrieved* party (R. 30).

Aside from the hypothesis of reversal, the reasoning of the court is unsupported by the facts found after trial by the Superior Court. Payment of an allowance pursuant to the will could be made only in the event of *denial* of an application therefor by the Probate Court (R. 5, 6). On the contrary, two applications were granted by that court, as was found (R. 23, Finding 15). Therefore, the condition prerequisite to payment under the will by the executors, viz., *denial* of the application for allowance, never happened.

Pertinent to the decision, which turned on a hypothetical premise, is the observation of the New York Court of Appeals that:

> "A judicial opinion, like evidence, is only binding so far as it is relevant, and when it wanders from the point at issue it no longer has force as an official utterance."
>
> *Colonial City Traction Co.* v. *Kingston City R. Co.*, 154 N. Y. 493, 495.

The rationale of the Supreme Court of Errors' decision is that petitioner was not aggrieved thereby, for if the money

withdrawn from the residue of the estate for the widow's "support" were not paid out in accordance with the governing statute and case law applicable, it might have been taken anyway pursuant to the will, with the net result that petitioner's loss in dollars would have been the same in either event.

This Court has given an apt answer to such sophistry in *Coe* v. *Armour Fertilizer Works*, (237 U. S. 413). There it was held to be no answer to one who protests the taking of his property without due process of law to say that in his case due process would have led to the same result anyway because the protestant had no adequate defense upon the merits. The Connecticut court, however, never reached the merits of the case with respect to local law, but did speak emphatically on the federal questions presented to it. It said that petitioner's contention thereon "is tenuous, unconvincing and without support in authority", but itself gave no citation of authority or other support for that conclusion (R. 29). It merely concluded, *sans* supporting reasons, that it was not unconstitutional to treat the payments made as a "gift to the widow under the third paragraph of the will" (R. 29).

The point stressed by the Supreme Court of Errors that reversal of the judgment on review would not have resulted in a difference of $1 to petitioner (plaintiff) but serves to emphasize the denial of due process to him. Petitioner as a litigant was entitled to a fair adjudication on the facts found by the trial court and not upon the supposition that he would lose no more if the appellate court should reverse. Of course, he has lost a right granted to every remainderman since time immemorial, viz., the right to review upon the final accounting of the estate fiduciaries the propriety of any payments made by them as legacies or gifts.

It is crystal clear, we think, that petitioner has been denied due process in this case in two respects: (1) He has had

no adjudication as to the merits of the application for allowance in accordance with the long established statute appertaining thereto and the case law construing it and (2) Without any hearing whatever he is denied in advance the right and privilege of judicial scrutiny of the payments made to the widow, under the head of a gift or legacy, upon the final accounting of the respondent executors.

Due process is not a matter of dollars and cents; and a procedural decision is no adequate substitute for a decision arrived at on the merits of the issues presented to the proper tribunal, especially when that tribunal is created and empowered to act by statute.

By Connecticut law a widow's allowance can only be reviewed by appeal from the order granting it and not upon the final accounting (*Reiley* v. *Healey*, 122 Conn. 64, 79). A legacy or gift, however, paid to the widow is always reviewable on the final accounting of the estate fiduciaries. But by the decision below, petitioner has been foreclosed from such review and from proper protection of his property. His situation is well described by this Court in *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill* (281 U. S. 673, 682).

> "Whether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it."

In *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306, this Court held that due process was violated by a trustee's accounting rendered without notice to known beneficiaries. In the instant case, in advance of the executors' final accounting, the propriety of the payments of $18,750 made to the widow "pursuant to the will" is prejudged against petitioner (R. 22-23, 30). Clearly due process has been denied him for he is deprived both of notice and of an

opportunity to be heard on the legality of such payments when the final accounting shall be rendered.

Point II

Paragraph Three of the Testator's Will, As Interpreted, Ousts the Probate Court of its Jurisdiction Over Widows' Allowances and Deprives Petitioner of His Rights Under the Due Process and Equal Protection of Law Provisions of the XIVth Amendment to the Constitution.

In the construction of wills it is axiomatic, where the terms are unambiguous, that the court may not "construe" the language used. In this case the Supreme Court of Errors said that the wording of paragraph three of the will was "free from any possible ambiguity" (R. 28). But later in its opinion it said:

> "The clause of the will in question contains in reality a pecuniary bequest made on condition" (R. 30).

It has already been noted that the condition referred to, viz., denial of the widow's application for support, never occurred. Indeed the lower court's opinion states that there was no *lack* of an order granting an allowance (R. 27). This conflicts with the Connecticut court's assertion in *Hoenig* v. *Lubetkin* (137 Conn. 516, 524):

> "We may construe a will but we are powerless to construct one."

Here the clear purport of the third paragraph of the will is to oust the Probate Court of its jurisdiction over widows' allowances. That paragraph reads:

> "I direct my executors on behalf of my wife, Hetty S. Weidlich, to apply to the Probate Court for an allowance for her support and maintenance while my estate is in the process of settlement, and if, for any reason, the Court shall not make such allowance, I direct my

> Executors to pay to my wife for her support and maintenance the sum of One Thousand Two Hundred and Fifty Dollars ($1,250.00) per month, while my estate is in the process of settlement, however long that period may be, and to charge said sums against the principal of my estate."

Making the denial of the application a condition precedent to direct payment of the allowance by the executors ousts the Probate Court of jurisdiction. Whether such denial is on legal or illegal grounds is in terms immaterial. The stultifying effect of such direction is that mere denial of the executors' application empowers payment by them in contravention of the very law declared. Such a result makes a mockery of the judicial process.

In the field of contracts, made in advance of controversy, where the object is to oust the courts of jurisdiction, such contracts have been held unenforceable.

Parker, Peebles & Knox v. *El Saieh*, 107 Conn. 545, 557;
Home Ins. Co. v. *Morse*, 87 U. S. 445;
Doyle v. *Continental Ins. Co.*, 94 U. S. 535;
Williston on Contracts, § 1725, note 2.

The Connecticut court in Parker, Peebles & Knox, the leading case in Connecticut on ouster of jurisdiction, referred to:

> "the general principle that it was not within the province of the parties to enter into an agreement concerning the recovery for a breach of contract, which is created and regulated by law."

There the contractual clause held void was the requirement that the parties submit any dispute which might arise to a specified court in Haiti and not to the Connecticut courts. Here the testamentary provision objected to calls for resort to the statutory court having jurisdiction, but, in the event of

denial of the application for support, directs the very relief applied for to be paid over by the executors, despite the court's ruling to the contrary.

The end result of the third paragraph of the will, construed as valid, is to oust the Probate Court of its established statutory jurisdiction over the widow's allowance. Even denial of the application on procedural grounds would permit payment to be made by the executors. So would denial on substantive grounds. Thus, since denial on any ground but serves to authorize payment by the executors contrary to the decision reached, the court confronted by the application might conceivably grant the application in order to avoid the flouting of its own mandate.

We come to the question whether or not the holding by the Connecticut court on the validity of paragraph third of the will is an adequate state ground independent of the question of due process. We think it is not and will so argue.

In the first point herein we have already noted that the Supreme Court of Errors ruled explicitly against petitioner (plaintiff) on the federal question raised (Opinion, R. 27, 29). Secondly, decision on the question of due process was necessary to the judgments rendered.

Petitioner has contended that he has not had his day in court in accordance with due process. There has been no determination in any lower court of the necessity for a widow's allowance under the long-settled construction of § 7033, General Statutes of Connecticut. The widow, not being dependent upon either her husband or his estate, did not come within the orbit of § 7033.

Instead the highest Connecticut court has ruled obliquely as a procedural matter that petitioner is not aggrieved by the decision, for if the widow's allowance was not granted in accordance with the law of § 7033, *then she might have been paid the same amount pursuant to the will.* But if the

latter event occurred, no court has so found. Thus, due process has been denied petitioner, for he will not be permitted, under Connecticut procedure, to review the allowance paid to the widow as a "gift or legacy" upon the executors final accounting. It follows necessarily that petitioner has not had and cannot have a judicial review of the propriety of the payments made. He is in effect deprived of his day in court on the very issue upon which the Supreme Court of Errors has sought to justify the further allowance.

A case in point is *In re Andrus' Will* (281 N. Y. S. 831), decided by the Surrogate's Court of Westchester County, New York. There legatees were required by the will to accept in writing an accounting to be rendered by trustees of certain *inter vivos* trusts established by the testator. Noncompliance with the condition imposed forfeiture of the legacies. The Surrogate's Court held that the provision was contrary to the XIVth Amendment in that it attempted to remove from the New York courts the supervision of the administration of trusts, with which they were vested by the state constitution and statutory law (231 N. Y. S. at 860). The court quoted the following passage from the opinion in *Home Insurance Co.* v. *Morse,* 20 Wall 445, 451:

> "Every citizen is entitled to resort to all the courts of the country, and to invoke the protection which all the laws or all those courts may afford him."

This case involves an important question of federal law even though the amount of money be small. It is concerned with the division between legislative and judicial powers. The people of Connecticut since 1825 have seen fit, acting through their legislature, to empower the Court of Probate to determine when widows' allowances should be granted upon a proper showing of necessity therefor.

The taking of petitioner's property without due process and the court's disregard of § 7033 of the General Statutes

of Connecticut (1949) are questions presented by this private litigation. The propriety, however, of the Connecticut court's ruling thereon is a matter of public concern. If the plain terms of state statutes may be ignored by the judiciary that branch of the government is in reality exercising legislative functions.

Legislative power is not judicially enforced by the decision of the highest Connecticut court that if the requirements of § 7033 were not observed below, petitioner's objection thereto is nevertheless immaterial, for if the remaindermen's money were not paid out as an allowance, an assumption unwarranted by any finding, it might have been paid over as a bequest. Such conclusion flies in the face of Findings 7, 11, 15 and 17 (R. 21-23).

The Supreme Court of the United States has refused on several occasions to decide hypothetical questions; but the Supreme Court of Errors makes no bones about resting its decision on a purely hypothetical basis in disregard of the long established statute, and settled construction thereof, governing the subject of widows' allowances.

This Court, while bound by the construction of a state statute as pronounced by the state courts, is not concluded by the reasoning of those courts in determining whether such construction is repugnant to federal constitutional restrictions. Similarly here, when called upon to determine whether the Connecticut court has brushed aside the state statutes protecting petitioner's property interests and his right to a real hearing, this Court should not hesitate to exercise its independent judgment of the federal questions raised. We respectfully submit that the intertwining of the state and federal questions, both disposed of below as a mere procedural problem, is not enough to defeat the jurisdiction of this Court. Supporting that view is the case of *Milk Wagon Drivers' Union* v. *Meadowmoor Dairies*

(312 U.S. 287) where this Court decided that it possessed revisory power over state practice when used to evade federal constitutional guaranties.

Conclusion

It is respectfully submitted that the issues raised by your petitioner under the XIVth Amendment to the Constitution of the United States involve important questions of federal law, that they call for the exercise of the supervisory powers of this Court, and that the petition for certiorari should be allowed.

Respectfully submitted,

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14

Office - Supreme Court, U. S.
FILED
AUG 28 1953
HAROLD B. WILLEY, Clerk

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 202

WILLIAM WEIDLICH,

Petitioner,

vs.

ESTATE OF LOUIS WEIDLICH (THE FIRST NATIONAL BANK & TRUST COMPANY OF BRIDGEPORT AND ARTHUR M. COMLEY, EXECUTORS) AND HETTY S. WEIDLICH.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

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INDEX

PAGE

Opinions Below 1

Statutes Involved 2

Argument 2

Point I—The petitioner has been accorded due process and equal protection of the law 2

Point II—The constitutional guarantee of due process does not extend to testamentary disposition of private property 3

Point III—The petitioner has no standing to raise the constitutional question, and no Federal question is presented by the issues decided by the State Court 4

Conclusion 5

Table of Cases

American Railway Express Co. v. Kentucky, 273 U.S. 269.. 3

Bankers Trust Co. v. Blodgett, 96 Conn. 361, affirmed 260 U.S. 647 4

District of Columbia v. Clawans, 300 U.S. 617 3

Farmers Loan & Trust Co. v. Waterman, 106 U.S. 265 4

Fayerweather v. Ritch, 195 U.S. 277 4

Goltra v. Weeks, 271 U.S. 536 3

Lawrence v. Security Co., 56 Conn. 423, 433 4

Reetz v. Michigan, 188 U.S. 505 3

Smithsonian Institute v. Meech, 169 U.S. 398 3

Thomas' Appeal, 85 Conn. 50 4

Other Citations

12 *American Jurisprudence* 285, *Constitutional Law*, Section 587 3

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OPINIONS BELOW

The opinion of the Supreme Court of Errors of the State of Connecticut is reported in 96 Atl. 2d 547 (R. 25-30); motion for reargument denied (R. 36). The opinion of the Superior Court was not reported (R. 16-18).

STATUTES INVOLVED

Sec. 7033. General Statutes of Connecticut, (1949.) "Allowance for support of surviving spouse and family. The court of probate may allow out of any estate of a deceased person in settlement before such court such amount as it may judge necessary for the support of the surviving spouse or family of the deceased during the settlement of the estate."

Sec. 7071. General Statutes of Connecticut, (1949). "Appeals from probate. Any person aggrieved by any order, denial or decree of a court of probate in any matter, unless otherwise specially provided by law, may appeal therefrom to the superior court in the county where such court of probate is held, but he shall give bond, with sufficient surety to the state, to prosecute such appeal to effect."

ARGUMENT

Point I

The Petitioner Has Not Been Denied Due Process of Law.

The Probate Court heard the application of the surviving spouse seeking a further widow's allowance. Finding the allegations thereof to be true, the Probate Court granted the application (R. 38). That hearing and the order thereon were predicated upon the statutory jurisdiction of the Probate Court. This was due process of law. The fact that the petitioner

is dissatisfied with the result does not alter the legal and constitutional character of the proceedings. **American Railway Express Co. v. Kentucky,** 273 U.S. 269; **Goltra v. Weeks,** 271 U.S. 536.

The petitioner had no constitutional right to an appeal. **District of Columbia v. Clawans,** 300 U.S. 617; **Reetz v. Michigan,** 188 U.S. 505. The right of appeal is conferred by statute, Sec. 7071, General Statutes of Connecticut (1949), but is limited to those persons who are aggrieved by a decision of the Probate Court. The petitioner had a hearing in open court, before the Superior Court, in the form of a trial de novo. The Court found (R. 23) that the petitioner was not aggrieved by the order of the Probate Court. The petitioner's Reasons of Appeal (R. 5), paragraph 14, allege that he is aggrieved. The case, therefore, turned upon a material issue raised by the pleadings, and the petitioner simply failed to sustain the burden of proof. The petitioner has, therefore, received the full judicial consideration provided by the statute law of Connecticut; nothing has been denied him. He cannot complain because the appellate courts refused to reconsider the merits of the widow's petition.

Point II

The Constitutional Guarantee of Due Process Does not Extend to Testamentary Disposition of Private Property.

The provisions of the will, however construed, cannot give rise to any claim of deprivation of due process. **12 Am. Jur.** 285; **Constitutional Law,** Sec. 587; **Smithsonian Institute v. Meech,** 169 U.S. 398;

Bankers Trust Co. v. Blodgett, 96 Conn. 361, affirmed 260 U.S. 647.

Moreover, no matter what construction be placed upon the will, petitioner has been accorded due process according to the law of the State of Connecticut.

Point III

The Petitioner Has No Standing to Raise the Question of Due Process of Law, and No Federal Question is Presented by the Issues Decided by the State Court.

The right to dispose of property by will exists quite apart from, and is not affected by the provisions of the Constitution of the United States.

The petitioner, seeking to avoid this dilemma, argues that Section 7033 confers an exclusive and prohibitive jurisdiction over widow's allowances upon the Probate Court. The Supreme Court of Errors has answered this argument saying "The Statute does not contain such a prohibition or language affording any basis for such an implication." (R. 29). **Lawrence v. Security Co.,** 56 Conn. 423, 433.

If that argument of the petitioner fails, he stands as an uninjured party. The finding of the highest court of the State is conclusive. **Fayerweather v. Ritch,** 195 U.S. 277; **Thomas' Appeal,** 85 Conn. 50.

As such, he has no status before this Court. **Farmers Loan & Trust Co. v. Waterman,** 106 U.S. 265.

CONCLUSION

It is submitted that petitioner has been accorded due process of law, and more, in respect to his claims; that, in any event, he has no status to claim a denial of due process; that the decision of the State Court upon local issues is conclusive; and that no Federal question is presented. The petition should be denied.

Respectfully submitted,

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INDEX

Subject Index

	Page
Reply brief of petitioner	1
The ruling of the Supreme Court of Errors	4

Table of Cases Cited

Bankers Trust Company v. *Blodgett*, 260 U.S. 647	4
Brinkerhoff-Faris Trust and Savings Company v. *Hill*, 281 U.S. 673	4
Pennoyer v. *Neff*, 95 U.S. 714	4
Shelley v. *Kraemer*, 334 U.S. 1	3

Statutes and Other Authorities Cited

Connecticut General Statutes (1949), Section 7033	2
Constitution of the United States, Fourteenth Amendment	3

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

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REPLY BRIEF OF PETITIONER

Respondents assert in their first point that petitioner was not denied due process because the allegations of the widow's application were found by the Probate Court to be true. That argument must fail, for it rests on a false premise. Both the Superior Court and the Supreme Court of Errors explicitly held that the Probate Court's order was granted upon the petition of the *executors* (R. 16, 26, 37) and not upon the widow's.

The allegations of the executors' petition, by which this litigation was initiated, state that a prior [*ex parte*] order had been entered by the Probate Court granting the widow an allowance, that payments thereunder had been made to her and that the estate was not settled (Ex. A, R. 37).

Nothing was said of the widow's need for support or her dependency upon the estate. The requirements of § 7033, General Statutes of Conn. (1949), were conveniently ignored by the executors and the court. Furthermore, the prior order referred to, dated August 15, 1950, was *ex parte* and was entered without notice to the remaindermen and without any opportunity for a hearing.

The accuracy of the Probate Court's finding that the allegations of the *executors'* petition were true cannot be questioned. Of course, an *ex parte* order was previously entered for an allowance in the same court and $15,000 was concededly paid to the widow thereunder (R. 21, 22). But petitioner's contention is that such decision, basing the grant of the further allowance on the mere fact that the same award had been previously made *ex parte,* is not due process.

Petitioner should not be deprived of his property in the estate except in accordance with the settled law construing §7033 and after notice of hearing. He had no adjudication on the merits of the necessity for any allowance. The court simply failed to enforce §7033, which was obviously enacted for the protection of remainder interests. Due process is not observed in basing an order for an allowance on the mere existence of a prior *ex parte* order, of which the interested property owners had no notice and no opportunity to oppose.

Similarly in the Superior Court, where trial *de novo* was had, and in the Supreme Court of Errors there was no determination on the merits. Both opinions of those courts are devoid of discussion of the merits of the application under §7033. In "confirming" the order appealed from the Superior Court made the following findings:

> (1) The widow received almost $292,000 from the estate and other sources (R. 21, 23).

(2) No evidence of her need for support or of dependency was offered (R. 22).

(3) The prior *ex parte* grant of allowance and payments thereunder was a reason assigned for granting the further allowance (R. 22).

(4) That the allowance requested, if not warranted by §7033, could be paid pursuant to paragraph third of the will (R. 22).

Acting upon the third and fourth findings, *supra*, the Superior Court held that payment of $1,250 a month to the widow was authorized by the will even *if* no order had been entered in the Probate Court (R. 21, 17). The requirements of §7033 were again disregarded. As we have said, the merits were never adjudicated in any of the three Connecticut courts through which the case has passed. Yet, respondents say that petitioner cannot complain because the appellate courts refused to "*reconsider*" the merits of the case!

Petitioner has been accorded the mere form of two trials and appeals. His property is taken from him on the alleged basis of a prior *ex parte* order to the same effect, as to which there was no notice and no hearing. We say that such procedure is a manifest denial of due process and ought not to be condoned by this Court.

The recent case of *Shelley* v. *Kraemer* (334 U. S. 1) holds that the 14th Amendment is directed against state action and does not reach private conduct. There, however, the private agreements containing restrictive covenants were judicially enforced in the state courts and thus were brought within the operation of the 14th Amendment. There it was said, *per* the late Mr. Chief Justice Vinson:

> "The action of state courts in imposing penalties or depriving parties of other substantive rights without providing adequate notice and opportunity to defend, has, of course, long been regarded as a denial of

the due process of law guaranteed by the Fourteenth Amendment. *Brinkeroff-Faris Trust & Sav. Co.* v. *Hill*, 281 U. S. 673, Cf. *Pennoyer* v. *Neff*, 95 U. S. 714."

The foregoing reasoning is applicable here.

Petitioner is deprived of his property on the allegation that the same amount was taken out of the estate pursuant to a prior *ex parte* order therefor. He was deprived on entry of the prior order of his right to notice, and was afforded no opportunity to defend.

In the instant case the Connecticut courts have signally failed to enforce the statutory law which protects petitioner's property interests. The hearings accorded to him were sham. The denial of due process is plain.

The Ruling of the Supreme Court of Errors

In *Bankers Trust Co.* v. *Blodgett* (260 U. S. 647, 649) an appeal taken from a Connecticut judgment, this Court said "It is the views and reasoning of the Supreme Court of Errors that must engage our attention as they constituted the foundation of the judgment of the Superior Court."

The reasoning of that court rests on the hypothesis that if it should reverse the Superior Court, then the same sums would become payable to the widow under the will so that the pecuniary loss to petitioner would be the same in either event. In that view, the court concluded that petitioner was not an aggrieved party (R. 30).

This reasoning is unique in our experience and deprives petitioner of his property by an adjudication which turns on a hypothetical premise. Secondly, it effectually deprives petitioner of his substantive right to questioning in open court on the final accounting of the executors any payments made to the widow as legacies or bequests. Not only is the privilege of defending against such payments denied to

petitioner but the propriety thereof is prejudged against him without notice or hearing of the issue. Such judicial juggling, we submit, constitutes denial of due process.

The Supreme Court of Errors, while refusing to pass on questions of substantive local law, ruled on the constitutional question raised by petitioner there and below. It disposed of the federal question before it by describing the petitioner's argument thereon as "tenuous, unconvincing and without support in authority" (R. 29). But no reasons or citiations of authorities supporting that conclusion were given.

We submit, on the record in this case, that in the face of the palpable denial of due process to petitioner, no reasoning supporting the contrary conclusion as reached could be found.

Respectfully submitted,

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